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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JETWAN DEMARR FREEMAN,

Defendant and Appellant.

F074878

(Super. Ct. Nos. VCF313721,  
VCF338683)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Erin J. Radekin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Franson, Acting P.J., Meehan, J. and Snauffer, J.

A jury convicted Jetwan Demarr Freeman (appellant) of unlawful use of tear gas and three counts of shoplifting. On appeal, appellant contends there was insufficient evidence establishing the substance he used was tear gas, and the prosecutor committed misconduct in rebuttal by exaggerating such evidence. We conclude the jury's verdict was supported by substantial evidence and appellant was not prejudiced by the prosecutor's comments, and affirm.

### **PROCEDURAL BACKGROUND**

The Tulare County District Attorney's Office filed an information charging appellant with unlawful use of tear gas (Pen. Code,<sup>1</sup> § 22810, subd. (g)(1)), assault with a deadly weapon (§ 245, subd. (a)(1)), and three counts of shoplifting (§ 459.5). After the People rested, the court granted appellant's section 1118.1 motion for acquittal as to the assault with a deadly weapon count. At the end of the trial, the jury found appellant guilty of all remaining counts.

### **FACTUAL BACKGROUND<sup>2</sup>**

Save Mart manager Sean Brenner was stocking the liquor aisle when he observed appellant place two large bottles of Crown Royal whisky in a basket, walk to the back of the store, and place one of the bottles in his pants. Brenner and another manager, Michael Weaver, approached appellant and asked him to return the bottle. Appellant initially denied taking anything, but after Weaver asked another employee to call the police, appellant took the bottle out of his pants and handed it to Brenner.

Weaver and Brenner followed appellant as he walked toward the store's exit. As they approached the door, Weaver took out his cell phone and took a photo of appellant. Appellant asked Weaver what he was doing, and Weaver responded he was taking his

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> We do not discuss the additional shoplifting counts because appellant does not challenge them on appeal.

photo and a photo of his car to alert other stores to watch out for him. Appellant kept walking, but as he reached the threshold of the door, Weaver saw appellant “fiddling” with his shirt. Appellant then turned, held up a small pink cannister with a spray top, and from two to three feet away sprayed it at Weaver’s face. Weaver held his hand up and ducked, and much of the spray went over his left shoulder.

After Weaver avoided the spray, appellant challenged him to a fight and repeatedly cursed at him. Weaver described the interaction as follows:

“[H]e kept saying, ‘I’m a man, I’m gonna get me some.’ I’m not sure what he was referring to, but kept saying that and then kept calling me a p\*\*\*\*, and I said, ‘I’m the p\*\*\*\*? You just pulled out a pink pepper spray and sprayed me.’ [¶] At that point, he pulled it back out of his pocket and threw it, says, ‘I don’t have it now, what’s up?’ ”

Weaver continued to tell appellant to leave, and requested an employee call the police to see if they were on the way. Eventually, appellant picked up the pink spray can, entered his car and drove away.

Weaver described the spray cannister as pink in color and approximately three inches in length. He was unable to see whether there was any writing on it. He testified he believed the substance was pepper spray because he recently purchased a small pink pepper spray cannister on a key chain for his daughter, and it “look[ed] just like” the one used by appellant. He did not see the spray come out of the can, did not notice any odor, and did not experience pain or difficulty breathing from the spray. The only physical effect he experienced was a “really bad— [¶] [c]hemical-type taste” in his mouth for the remainder of the day.

Brenner described the spray cannister as “pepper spray” with a small pink cannister with a spray top. He was also unable to see whether there was any writing on it. He was about five feet away when appellant sprayed Weaver and did not notice any odor from the spray. He observed some of the spray land on Weaver’s shoulder, but most of it went over him.

Appellant was arrested later that day. The spray cannister was never recovered.

## **DISCUSSION**

### **I. Substantial Evidence**

Appellant contends there was insufficient evidence the substance he sprayed at Weaver was “tear gas” within the meaning of section 22810, subdivision (g)(1). We disagree.

“To determine the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the prosecution to determine whether it contains [substantial] evidence that is reasonable, credible and of solid value, from which a rational trier of fact could find that the elements of the crime were established beyond a reasonable doubt.” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955 (*Tripp*).) We “presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) “We need not be convinced of the defendant’s guilt beyond a reasonable doubt; we merely ask whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” (*Tripp, supra*, at p. 955.) This standard of review also applies to circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) If the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury’s findings, our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329; *People v. Panah* (2005) 35 Cal.4th 395, 488.)

Section 22810, subdivision (g)(1), prohibits the use of “tear gas or any tear gas weapon except in self-defense.” Section 17240, subdivision (a), defines “tear gas” as “any liquid, gaseous or solid substance intended to produce temporary physical

discomfort or permanent injury through being vaporized or otherwise dispersed in the air.”<sup>3</sup>

We conclude the jury’s finding appellant used tear gas was based on sufficient circumstantial evidence. The witnesses’ description of the spray cannister was consistent with a small can of pepper spray and appeared similar to the pepper spray cannister Weaver recently purchased for his daughter. Appellant’s attempt to spray Weaver in the face from close range was consistent with the use of tear gas. Weaver experienced a bad chemical taste in his mouth, consistent with being exposed to tear gas. Also significant was appellant’s tacit acknowledgement he was using pepper spray during his confrontation with Weaver. When Weaver responded to appellant’s insults by stating appellant had just sprayed him with “pepper spray,” appellant threw the can down and said, “I don’t have it now,” implicitly acknowledging the spray cannister contained pepper spray. Considering the totality of the circumstantial evidence, it was reasonable for the jury to infer the cannister contained a tear gas as defined by section 17240, subdivision (a).

Cases addressing the analogous issue of whether sufficient evidence established the use of a firearm as opposed to a toy gun provide helpful guidance. For example, in *People v. Monjaras* (2008) 164 Cal.App.4th 1432 (*Monjaras*), the defendant demanded the victim’s purse and pulled up his shirt to display the handle of a black pistol. (*Id.* at p. 1436.) The victim testified the gun looked real, but had never personally handled one, and could not say with certainty whether it was real or a toy. (*Ibid.*) The jury convicted the defendant of robbery and found he personally used a firearm (§ 12022.53, subd. (b)). (*Monjaras, supra*, 164 Cal.App.4th at p. 1434.) The court rejected the defendant’s claim there was insufficient evidence at trial to support the inference the gun was real, stating:

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<sup>3</sup> The court included this definition of tear gas in the jury instruction defining the elements of unlawful use of tear gas.

“[W]hen as here a defendant commits a robbery by displaying an object that looks like a gun, the object’s appearance and the defendant’s conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b). In other words, the victim’s inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm.” (*Monjaras, supra*, 164 Cal.App.4th at p. 1437.)

Similarly, appellant attempted to assault Weaver with an object that looked like a spray canister that contained tear gas and used it in a manner consistent with the use of a spray canister containing tear gas. The inference pointing away from guilt, that the spray canister contained some innocuous substance such as hair spray, is inconsistent with appellant’s assaultive words and conduct. Although there was no direct evidence or expert testimony establishing the spray canister contained tear gas, the jury was able to reasonably infer it did contain tear gas based on all the circumstantial evidence. As our high court stated, “an appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury’s findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

## **II. Prosecutorial Misconduct**

Appellant contends the People committed prosecutorial misconduct by misstating Brenner’s and Weaver’s testimony in a way that exaggerated their basis for believing the spray canister contained tear gas. During rebuttal, the prosecutor stated Brenner “recognized the pink canister to be pepper spray.” Defense counsel objected, claiming the prosecutor’s statement misstated the testimony, and the court overruled the objection, stating: “Ladies and gentlemen, you will determine what the state of the evidence is.” The prosecutor continued rebuttal, and characterized Weaver’s testimony as follows:

“Now, I specifically asked [Weaver], I said how did you know it was pepper spray? How did you—can you tell us what made you decide that it was pepper spray? Pepper spray, how did you know it wasn’t water, it wasn’t apple juice, how did you know? *And he testified he knew it was*

*pepper spray because he bought the exact same pink canister for his daughter. That’s how he knew it was—he recognized the bottle. [¶] He talked about—the opposing counsel asked him questions if the cap on it was on or off, but you heard from the victim, himself. He recognized the pink bottle because he had bought it for his daughter for her protection. So he recognized the canister, and not only that, but in addition to that, the victim testified that he had [the] taste of it in his mouth, the bitter taste of it, and he recognized that to be also.” (Italics added.)*

The standard of review of a prosecutorial misconduct claim is settled. (*People v. Parson* (2008) 44 Cal.4th 332, 359 (*Parson*).) A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct that requires reversal under the federal Constitution when those methods infect the trial with such unfairness as to deny due process. (*Ibid.*) Under state law, a prosecutor who uses those methods commits misconduct even when a fundamentally unfair trial does not ensue. (*Ibid.*)

Prosecutorial misconduct occurs when a prosecutor misstates evidence during closing arguments (*People v. Davis* (2005) 36 Cal.4th 510, 550) or makes statements regarding facts which are not in evidence (*People v. Linton* (2013) 56 Cal.4th 1146, 1147). “ ‘ ‘ ‘[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.’ ” ” ” (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

To prevail on an appellate claim of prosecutorial misconduct in argument to the jury, the defendant must also show a reasonable likelihood that the jury understood or applied the comments at issue in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In reviewing the record, the appellate court does not “lightly infer” that the jury drew the most damaging, rather than the least damaging, meaning from the prosecutor’s comments. (*People v. Frye, supra*, 18 Cal.4th at p. 970.)

We conclude the prosecutor’s mischaracterization of the evidence in rebuttal was improper, but does not require reversal. Brenner assumed the substance was pepper

spray, but never articulated any basis for his assumption during his testimony. Weaver testified the spray cannister looked like the can of pepper spray he purchased for his daughter, but never testified he recognized it as an *identical* can of pepper spray, and he did not testify he *recognized* it as pepper spray based on the chemical taste he experienced in his mouth. These comments were improper because they exaggerated the strength of the evidence establishing the substance appellant sprayed was tear gas. However, we find the misstatements were relatively minor, and do not rise to the level of “deceptive or reprehensible methods to persuade the jury” that necessitate reversal. (*Parson, supra*, 44 Cal.4th at p. 359.)

Two additional factors lead us to conclude appellant was not prejudiced by the prosecutor’s comments. First, after defense counsel objected, the court admonished the jury that they alone are to determine “what the state of the evidence is.” Second, while deliberating, the jurors sent a question to the court asking whether the definition of tear gas includes “hair spray, mouth spray etc.,” to which the court responded it does not. The jurors’ question indicates the jurors gave serious consideration to defense counsel’s argument in closing that the possibility the cannister contained hair spray or mouth spray constitutes reasonable doubt. Had the jurors accepted the prosecutor’s characterization of the evidence, the question would likely have been irrelevant. Therefore, we conclude appellant was not prejudiced, and reversal is unwarranted.

### **DISPOSITION**

The judgment is affirmed.